UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 01-01139(KJC)

- x

In the Matter of:

W.R. GRACE & CO., ET AL.,

Debtors.

- x

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

April 15, 2015

10:01 AM

B E F O R E :

HON KEVIN J. CAREY

U.S. BANKRUPTCY JUDGE

HEARING re Debtors' Objection to the Proof of Claim Filed By Norfolk Southern Railway Company [Filed 7/20/02] (Docket No. 22553)

HEARING re Motion for Order Implementing the Plan's Discharge of Prepetition Litigation Claims and the Related Injunction Where Claimants Did Not File Proofs of Claim [Filed: 2/27/15] (Docket No. 32511)

HEARING re Anderson Memorial Hospital's Motion to Alter or Amend Order Denying Motion for Class Certification and for Entry of Scheduling Order and Granting Related Relief [Filed 3/5/14] (Docket No. 31812)

Transcribed by: Jamie Gallagher

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Good morning everyone.

(Chorus of good morning)

MR. O'NEILL: Good morning, Your Honor. James O'Neill appearing on behalf of W.R. Grace from Pachulksi Stang Ziehl Young & Jones. And appearing with me today are my co-counsel from the Kirkland & Ellis firm, John Donley and Lisa Esayian.

MR. DONLEY: Good morning, Your Honor.

THE COURT: Good morning.

MS. ESAYIAN: Good morning, Your Honor.

MR. O'NEILL: Mr. Donley and Ms. Esayian have been involved in the W.R. Grace case for many years, but I don't know that they've appeared before Your Honor. So this is the first time appearing before you. Also with us today is our client, Richard Fink, who is vice-president and associate general counsel of the reorganized debtors.

Your Honor, turning to the agenda, item number 1 is continued and the Court has entered an order with respect to item number 2. Item number 3 is Anderson Memorial's motion. And I'll yield the podium to Anderson Memorial.

THE COURT: Very well.

MR. O'NEILL: Thank you.

MR. SPEIGHTS: Good morning, Your Honor. I'm

Daniel Speights of Speights & Runyan from South Carolina. With me at counsel table is my law partner Gibson Solomons and next to Mr. Solomons is David Rosendorf of Kozyak Tropin and Throckmorton out of Miami, who is now bankruptcy counsel, that is Anderson's bankruptcy counsel, for a number of years. And next to Mr. Rosendorf is Ted Tacconelli of Ferry Joseph, who is our Delaware counsel in this matter.

Your Honor, I feel like I have represented Anderson Memorial Hospital since the beginning of time, as I look around --

THE COURT: Based upon my review of the submission, it appears that way.

MR. SPEIGHTS: As I look around the courtroom, there's only one other person who was present at the creation and that was Mr. Fink, who's here today. So Mr. Fink and I are probably the only people around now that can recite the chapter and verse of the history of Anderson Memorial.

I acknowledge at the outset that this dispute has a long history. However, I really do not believe it is necessary to go into that history today.

THE COURT: I might tend to agree with you, but maybe for not the same reasons that you might say, because I'd like you to first address a hurdle that seems to me it's virtually impossible for you to overcome with respect to the

relief that you've requested and that is, there's a confirmation order which confirmed a plan, which has been upheld on appeal, and which various courts have discussed many of the issues you raise yet again today, why and how -- maybe how's the better question, can I look beyond that?

MR. SPEIGHTS: We don't ask you to look beyond that, Your Honor, we embrace the plan. We think the plan is the strongest thing in the entire record supporting class certification of this matter.

THE COURT: But doesn't it make you -- the plan treatment of seven, eight claimants clear and are you not obligated to follow that process? Are you not -- and does not the plan require that process to move forward?

MR. SPEIGHTS: Your Honor, the plan, first of all, recognizes that Anderson Memorial Hospital has a right to appeal the denial of certification. So the plan recognizes that there may be a class action on behalf of Anderson Memorial Hospital. So that's number one.

THE COURT: But you don't think confirmation of the plan constitutes a final judgment on that issue I take it?

MR. SPEIGHTS: Well, the plan itself recognizes that Anderson still has its rights to appeal the confirmation. There's a problem that we have to go to trial probably first.

THE COURT: Which you did and lost.

MR. SPEIGHTS: We haven't been to trial. We haven't tried the case. Let me just briefly address that. Under class action law, it is pretty well accepted that you cannot appeal a confirmation until the underlying claim or case has been tried. So absent reconsideration, we would go to trial. And we can't settle. Anderson is a class representative. It has a duty to the class. So we would have to try the Anderson individual claim before Your Honor, a trial that might take some time, and win or lose, we could then appeal to the District Court in the Third Circuit and ask for a reversal of Judge Fitzgerald's denial of class certification. Grace says that in its brief. We say that's probably the way it would have to happen and then if we get a reversal in the Third Circuit, we will be back here. In accordance with the plan, we will be back here with a certified class and we will ask Your Honor to try the certified class in accordance with the plan of reorganization.

The plan itself, again, recognizes that there are a substantial number of property damage claims and it provides individual remedies of those claimants. Each one of those claimants can seek to file his case individually. Maybe some of them here with a motion for late filed claims. Maybe some of them will pass through this gauntlet and be

tried later. And that process will go on for years. But --

THE COURT: Well, one of the issues or one of the reasons Judge Fitzgerald denied the request for class certification and the District Court affirmed that was that she felt and held that class certification process would be an improper end around the bar date. What say you to that?

MR. SPEIGHTS: I say number one, a lot has changed since then, and that's the basis for our motion.

THE COURT: Well what --

MR. SPEIGHTS: But I want to say more importantly --

THE COURT: Wait a second, other Frenville, which the Third Circuit discussed, other than that, what?

MR. SPEIGHTS: I know I'm a pain, Your Honor. First of all, Judge Fitzgerald found that you had to file an individual claim to be a part of the class, okay, because there wasn't numerosity without that.

THE COURT: What she found was that if you wanted class treatment, you had to file a motion requesting it and apparently you never did.

MR. SPEIGHTS: Your Honor, that's -- I don't know which issue you want me to address first. I've got that issue and -- I've got 14 reasons why Judge Fitzgerald would run on that issue.

THE COURT: I read them.

MR. SPEIGHTS: Well, I didn't actually elaborate on all of them, but I did briefly say that. Let me go back to the plan and then go back to what's changed.

Under the plan, which is the biggest change, unlike the situation that existed in 2008 when Judge Fitzgerald ruled, there are a substantial number of PD claims. The universe is not limited to those who filed individual claims. There are a substantial number of PD claims that can be tried individually and paid 100 cents on the dollar if allowed.

I'll tell Your Honor about the bar date. If theoretically every member of the class got actual notice, actual notice, which of course is impossible in a tort case, but if they had actual notice, I would still be before Your Honor saying there now needs to be a class treatment because this is a classic Rule 23 issue. You're either going to have a multiplicity of individual trials or, consistent with the plan and its recognition of Anderson as having a right to be a class representative, you will have one trial in this Court, a bench trial on behalf of all the property damage claimants, all the present property damage claimants less opt outs. That's a classic Rule 23 issue. That was not the issue before Judge Fitzgerald.

Judge Fitzgerald was dealing with a situation

where she believed, and I respect Judge Fitzgerald for this, that the bar date limited any participation of property damage claimants from recovery in this bankruptcy.

THE COURT: Well, she also found you didn't meet the numerosity requirement.

MR. SPEIGHTS: And, Your Honor, it's understandable that Judge Fitzgerald said there's no numerosity if you say that all claims are barred unless they were filed individually before the bar date. Now we would say, well, we have a class claim with 3,000 claimants attached to the claim form also filed in accordance with the bar date. But Judge Fitzgerald, his opinion was that would disrupt the development of a plan. Now we have a plan and now we have a plan that permits this. But leaving that aside, she ruled it was a lack of numerosity. And that's the issue, the fundamental issue that was a basis of that decision. But the basis was you --

THE COURT: Well, she also dealt with the 23(b) issue as well, right?

MR. SPEIGHTS: Well, she also dealt with the term superiority on the grounds that if there are -- if you are limited to the individual claims that were filed before the bar date that have not been settled, then in Judge Fitzgerald's view, there was a lack of superiority as well.

But if you go back to my fundamental point, Judge Fitzgerald did not have a plan before. The plan had not been filed. The proposed treatment for property damage claims had not been filed. There was a major (indiscernible) change, excuse me, when the plan was filed. The (indiscernible) change was that rather than resolving claims within the bankruptcy and it limited to just those who filed individual claims, there are, because Grace wanted a 524(g) injunction. They're not (indiscernible), they recognize that. And to get a 524(g) injunction, they retained an expert witness who testified and convinced the District Court and the Third Circuit, in opposition to us on a 524(g) injunction, they convinced both Courts that there were a substantial number of PD claims. Ipso facto, there is numerosity because that's entirely different in Judge Fitzgerald's view before, and I'm not criticizing Judge Fitzgerald, before Grace filed this plan saying that there are a substantial number of PD claims.

Now, Your Honor, we're asking you about -- I'm ready to move to the question of you didn't comply with filing on time, but I don't want to leave this issue because obviously it's the fundamental issue involving the Court about whether there's some way we are proceeding in a way inconsistent with the plan. I firmly believe, and I believe what we're asking today is for discovery but whether we get

discovery or not, we're asking to brief class certification.

There's a whole lot here that we want to say in the brief for class certification. We're asking for a scheduling order and class numerosity discovery. And whichever way you rule on that, Your Honor, we want to file our brief on class certification to make all of these points to you. What we will say in that class certification brief, there are far stronger reasons for certifying the class now in light of the plan and the changed conditions than there were before Judge Fitzgerald in 2007 when we argued the matter.

I mean, in reality, Judge, Judge Fitzgerald was legitimately concerned about anything that would delay -- further delay, I might add, the confirmation of a plan of reorganization in this case which had been going on altogether too long. And she says on the last page of that order that she was concerned that certification of a class would prolong the development of a plan.

THE COURT: Well --

MR. SPEIGHTS: That's not the case now. We have a plan.

THE COURT: -- notwithstanding that, she concluded on the merits that you were entitled to class certification and the District Court affirmed that decision.

MR. SPEIGHTS: Your Honor, respectfully, the

District Court did not affirm that decision. I understand there's some language in the District Court opinion that I'm not real pleased with. We asked the District Court --

THE COURT: But when he said the Bankruptcy Judge was right, I guess you didn't think that was such a good thing, but that's what the District Court said.

MR. SPEIGHTS: The District Court said that, Your Honor, without any briefs on the merits. I mean, we briefed whether we're entitled to an interlocutory appeal. And we tried to go to the Third Circuit and the Third Circuit would not take the case because it had no jurisdiction. So we have not had our final day of Court on that.

But regardless, again, I'm not here to criticize the District Court today. If the District Court, based upon what was in front of Judge Fitzgerald believed that, and I assume the District Court believed that because the District Court said that -- even if the District Court believed that, this is an entirely new landscape before you than what's before Judge Fitzgerald.

We now have the fundamental issue effectively reversed by the plan, the fundamental issue of numerosity. We have that as an established fact. We now have a 100 cent plan. And we now have a classic Rule 23 issue. Is this Court, over a period of years, and there is no time limit on this -- is this Court or other Courts in the United States

going to deal with the individual trials of asbestos property damage cases or does this Court want to do what Judge Kelly in Philadelphia did with the school class action, which was affirmed by the Third Circuit, and say it's far more efficient -- it makes far more sense to have one class action to deal with this.

Incidentally, W.R. Grace consented to a class action in the school's class action. W.R. Grace moved with the plaintiff's counsel there for a class action which resulted in that landmark Third Circuit decision in the school's class action. And there's no difference here. In fact, there are even stronger reasons, perhaps, for a class action in light of the plan here that existed for the school's class action.

You know, W.R. Grace said in its first pleading in this case after its petition, it's called an informational brief, is -- I know it by heart, it's docket number 6. They said these claims should be tried -- all these claims in one bench trial. That was W.R. Grace's position when it filed the case. Now we come along and say, we agree with you. They should be tried in one bench trial as a Rule 23 class action and resolve these matters once and for all in one case, in one forum before the Bankruptcy Judge in Delaware. That's the result of years of litigation which had pushed us to this.

And while Grace should celebrate that it got its plan affirmed, I can celebrate that it got its plan affirmed on appeal by the Third Circuit. In order to do that, it had to take positions, understandably it had to take positions that there are a substantial number of PD claims and open the door, I think wide open, for a class action for the benefit, of course Anderson wants that. I think it's for the benefit of the Court, this Court, and other Courts. I think it's for the benefit of Grace to have one case and decide these issues.

But I want to go back where I was, Judge. And I'm happy to discuss the waiver issue. I haven't forgotten you asked me about that. We are -- I made a decision when we filed this motion to ask Your Honor, first, for limited numerosity discovery. The record on that matter is incomplete. Clearly there's been numerous buildings out there, but the record is incomplete because Judge Fitzgerald granted Grace's motion for protective order based upon her view that the class would be limited to those who filed individual claims, which was the law before American Reserve came out in the late 1980's.

So we want to have our record on that. Now, let me back up one more step, Your Honor. Judge Fitzgerald actually did not need to reach, at least she did not discuss, other issues because we met this wall. We met the

wall the first time we ever appeared before Judge Fitzgerald, before Grace even filed its responsive brief to class. "Mr. Speights, I don't see how a class is needed when we have a bar date order and we are limited to those" --

THE COURT: One moment, sir. All right. The recording system has a little hiccup, so if you'd wait one moment until we --

MR. SPEIGHTS: Yes, sir.

THE COURT: -- fixed it. I'd appreciate that.

(Recess)

THE CLERK: All rise. Be seated, please.

THE COURT: All right.

MR. SPEIGHTS: Your Honor, before picking back up where I left off, I want to return to that shortly but I'd like to do a little mop up operation and then get back to that.

THE COURT: Go right ahead.

MR. SPEIGHTS: And I'm specifically concerned about the issue you raised about Judge Fitzgerald suggesting that either I needed to file a motion to certify or a motion to file a class proof of claim back at a 2002 hearing which appears in footnote 5 of our order.

THE COURT: I didn't think it was a suggestion.

MR. SPEIGHTS: Well, I think I -- if you read the

2002 February transcript and nothing else, I would agree with Your Honor. I would also point out that at that 2002 hearing when Judge Fitzgerald made that statement, it was there on a motion for case management order including a bar date. The lawyer for the property damage committee immediately said to Judge Fitzgerald, if you have that requirement, I think the bar date notice should include that requirement. And Judge Fitzgerald readily agreed without equivocation and told Grace that it would have to be in the bar date notice.

What happened then, Judge, was there was no written order then. The written order came two or three months later in April when Judge Fitzgerald signed the bar date order and approved the notice. By that time, two more hearings had been held on that motion, that motion for case management order: a hearing in March and a hearing in April. And during those two hearings, Grace, which by the way had never suggested beforehand that you needed permission and, in fact, at a January hearing had suggested just the opposite. But in any event, at the March and April hearings, Grace and the attorney for the personal injury committee, Mr. Lockwood, who's also -- which the committee is also a plan proponent, told Judge Fitzgerald that they ought to follow the rule that Judge Newburg -- Judge Newsome had said in another case that anybody can file a class proof

of claim and that they didn't want, for reasons that I can discuss, but they didn't want such a requirement in the bar order needing permission. They didn't want to tee up class litigation upfront, especially in fairness with respect to ZAI litigation, but we were both there together, ZAI and traditional PD claimants.

So Judge Fitzgerald, on the record at those hearings, agreed and deleted one requirement about not being able to rely on Anderson from the class notice and has no provision whatsoever about requiring permission to file a class claim, which Judge Fitzgerald said should be there in response to Mr. Baena, the PD lawyer, if it had included that. So, as somebody who was at the February hearing and probably the March and April hearings, the record is absolutely clear when you read all three transcripts that Judge Fitzgerald changed her mind on that. But most importantly, Your Honor, the order that resulted from that hearings is a bar order. And a bar order does not have that requirement in it.

In addition, Your Honor, as we pointed out and as Judge Fitzgerald, in fairness, recognized, that is not a requirement as a matter of law. Both American Reserve, and in re Charter (ph), and probably other cases say that you don't file a request for class certification until there is a contested proceeding; until, as there was in this case,

Grace objected to the claim.

THE COURT: Okay, well, let's move on.

MR. SPEIGHTS: All right, well I would -- I do want to say three claimants filed class proofs of claim and none of them sought permission. In any event, I want to get back to the main question Your Honor asked me upfront.

Your Honor, when Judge Fitzgerald conducted a hearing in 2007 on this matter, she understandably did not consider Masonry Fill. And I say understandably because her view was "if they didn't file a claim by the bar date, they can't be in your class, Mr. Speights." Not one individual masonry claim was filed. It's not identified in the bar notice itself as an individual product. And yet we know that Grace has this vermiculite mine. It takes the bag of vermiculite and puts a label on it called ZAI and takes a bag of vermiculite and puts another label on it called Masonry fill.

Now thousands of ZAI claimants filed pursuant to a separate bar date order (indiscernible) notice. There's not one Masonry Fill. Now Anderson Hospital's class proof of claim, with attachments of records about Masonry Fill sales, seeks certification of the class to include Masonry Fill. Masonry Fill's last hope is Anderson in this case, and we didn't get that far with Judge Fitzgerald. She didn't have to analyze the fact that no Masonry Fill had been filed.

Again, we're not attacking the bar date order. I'll say that over and over again, but she did not consider that in context because if the rule was if it didn't file, you can't have a class, you don't need to consider that.

The other thing that Judge Fitzgerald did not consider in 2007 are products known as MK-4, MK-5, and MK-6, Your Honor. Not only did Grace put vermiculite in the bag of ZAI, it was vermiculite, and Masonry Fill, it added vermiculite to its fire proofing products. MK-3 was vermiculite, about a third, and some commercial asbestos. And when it pulled it from the market in '73, it continued to make monokote-4, then monokote-5, I believe monokote-6 with vermiculite. Well, vermiculite is contaminated with asbestos. It's the reason that ZAI claimants have got a pile of money from this bankruptcy. Vermiculite is in Masonry Fill and vermiculite is in those other products. Those products are not specifically identified in the bar date notice.

I do not know as I sit here whether Grace contends its bar order bars litigation involving its MK-4, 5, and 6 parties. I honestly don't know. If Grace contends that the bar order does not apply to those products, fine, they're not in my class. But if Grace contends they are barred by the bar date order, that's another product in this class that has gotten no attention whatsoever. And again, Judge

Fitzgerald didn't have to reach that because she was back at door number one that you can't have a class because a class is limited to people who file individual claims.

Thus, Your Honor, I anticipated, I'm not sure who else did, when Judge Fitzgerald ruled there would probably be an administration by a trust. I certainly didn't anticipate litigating all the claims. And I didn't anticipate there being a 100 cents on the dollar plan. That's unique in the asbestos world for property damage claims.

THE COURT: It's unique pretty much in any world.

MR. SPEIGHTS: Right. And so -- and I don't think -- I can't read Judge Fitzgerald's mind, I don't think she anticipated all of that. I think she wanted a plan confirmed. As it turned out, ZAI's paid by a trust, a percentage on the dollar. PI is paid by a trust, a percentage on the dollar. But traditional PD, for whatever reasons, under the plan and I love the plan -- I'll tell you again, I love the plan because the plan provides that all of the property damage claimants will have at least a day in Court to say they should proceed with their lawsuits, either individually, or because Anderson is recognized, through Anderson.

The one other thing before I leave what Judge Fitzgerald had, and I know that my bankruptcy lawyer,

Mr. Rosendorf, he loves to talk about Frenville and Owens Corning and that line of cases, Grossmann's, etcetera. But the case that I think is huge in this matter as a change which occurred is Judge Buckwalter's reversal of Judge Fitzgerald in the State of California case, because that was also a (indiscernible) change where Judge Buckwalter, against Grace's arguments, recognized that claims do not accrue simply because of what you know. Claims do not accrue until there's injury and there is contamination.

Now, Your Honor, to repeat perhaps what I said earlier -- I'm not sure what I said earlier, frankly. Regardless of what Judge Fitzgerald did and had before in 2008, we now know that claims are not limited as she thought. We now know that claims do not accrue until there's injury. We know that claims we litigated as opposed to being determined by a trust. We know that there's 100 percent plan. And we know that Anderson's rights are preserved under the plan.

So I say to Your Honor in response to your initial question that number one, the plan is the strongest basis for certification in this matter. Let me say that we not only embrace the plan, Your Honor, but I recognize that you are in charge of this plan. This is your plan now. You have inherited this plan from Judge Fitzgerald.

THE COURT: Trying to cheer me up?

MR. SPEIGHTS: I do not want to change a semicolon in that plan. I'm not going to come before you -- if you say we're alive and somewhat well when we leave here today and ask you to modify that plan one semicolon, one period, one word, it's the plan that we rely on so --

THE COURT: That's right. Only plan --

MR. SPEIGHTS: -- we are not in opposition to --

THE COURT: -- proponents can ask for modifications, so --

MR. SPEIGHTS: Well --

THE COURT: -- it wouldn't matter even if you did ask.

MR. SPEIGHTS: Right, I understand it, but they made a choice when they proposed this plan. It was extraordinarily different than what I thought it would be. We appealed because we wanted to go back to South Carolina and the Seventh Circuit said no -- excuse me, the Third Circuit said, "No, you will before the District -- before the Bankruptcy Judge in Wilmington." And that's what brings us here. But we do not want to amend that plan.

And I'll say something else that might seem strange given the history, we are -- that is, Anderson is, the bar date order's best friend. We are. Anderson's counsel, my law firm, was counsel in the (indiscernible) appeal where the Third Circuit upheld the bar order. You're

not going to see somebody from my law firm or my co-counsel come in here and argue against the Third Circuit decision on that point. I think there are problems with it, as I pointed out, but that's not the issue in this case. What's going to happen, Your Honor, the reason we're the best friend is, absent class certification -- if there's class certification, everybody's protected as of March of 2003 when we filed the class claim. If there's certification, the cases hold we had authority to represent all of these people as of March of 2003.

What's going to happen is if there's no certification, if there's no class, is people are going to start filing late filed claims. And I think, without question, some of those people are going to come in and say we have excusable neglect because Grace did not notify us. And therefore we want to have discovery concerning the bar date and what records Grace had. Those are the people who are out there that could challenge the bar date. Anderson is not challenging it. It filed its class claims as of the time of the bar date.

Lastly, Your Honor, I go back to the beginning. I understand the Court's concerns. Unfortunately, those concerns have not been addressed yet except in a very summary matter in my motion. We have asked to file either -- hopefully after some discovery, but if no discovery

promptly, our motion to certify in which we will address all of the issues, and we certainly will address the issues that the Court has raised today. We want to have our opportunity to fully address these.

It's a complicated record, but obviously given this history and given not only of the bankruptcy, but of the matter before Fitzgerald, there are a number of issues floating around there. But if Your Honor has concern about anything, in addition to being concerned about our undermining the plan or the question of what Judge Fitzgerald said in that hearing, we really have not addressed those issues yet, Your Honor. We really came in here to say we want discovery, Your Honor. We want to correct the record so that when eventually we get up to the Third Circuit, the record is clear on what the numerosity discovery would show.

It's clear what Grace had so that we can tell the Third Circuit, hopefully after first telling you and convincing you and the District Court that this is a manageable case. It is a superior case for many reasons, but among other reasons, it's a superior case because there are, in fact, computer -- there is a computer database upon which we can actually identify and when we, as class counsel, want to go out and notify class members, and get information, and deal with class members, we're not -- we're

not going to give the same notice that Grace did, which is a minimum notice to comply with due process under the Mullaney test, okay, which the Third Circuit upheld. We want to be able to affirmatively, and aggressively, contact every potential PD claimant and give them notice of this, notice of the pendency of the case, be able to set up communications with those people in order to represent them well as a part of the class. And when we argue superiority, I'll say I would love to have those records. But regardless of whether we have discovery or not, we want to brief the matter.

THE COURT: What's supposed to happen under the case management order, which governs class 7A claims, what's supposed to happen?

MR. SPEIGHTS: Well, clearly I can tell you what's supposed to happen to Anderson, but Anderson is almost unique. Anderson is the one claim filed before the bar date that will be litigated in this Court, clearly. At the other end of the spectrum there are future claims. Now when somebody's been involved in asbestos bankruptcy since (indiscernible), bankruptcy many years ago, I tell you quite candidly, Your Honor, that we have debated for many years whether there is such a thing as a future PD claim. And many people who support the idea now strongly opposed it in the past and vice versa. We appealed the issue to the Third

Circuit and said there's no such thing. The Third Circuit, I think, found it an intriguing issue and it ruled against us because of the language of 524(g).

What the Third Circuit did not tell us is what is the future PD claim? If Your Honor proceeds on the class as something that will be teed up, I'm sure Grace will want to be heard on that. I'm confident (indiscernible) PD future's representative will be heard on that, and we will want to be heard on that, but --

THE COURT: Let me try asking the question a different way because I'm not hearing the kind of answer that I'm looking for. So, let me ask it this way. Doesn't the case management order contemplate that the claim that was filed would first go through the process before we address the class issue or do you disagree with that?

MR. SPEIGHTS: I disagree with that, Your Honor.

THE COURT: Okay, tell me why.

MR. SPEIGHTS: I don't -- I have not read that in the plan to say that. You asked me about a negative. I have read nothing that suggests to me that Rule 23 is suspended and that you cannot reconsider class certification pursuant to Rule 23 at any time, for me or for Grace.

THE COURT: Well, until the entry of the final judgment, but okay.

MR. SPEIGHTS: Right.

THE COURT: Thank you.

MR. SPEIGHTS: Thank you, Your Honor.

MR. DONLEY: Hello, Your Honor. John Donley on behalf of Grace. I'd like to -- before I turn to discovery, which is the specific request as clarified by their reply, I'd like to very briefly respond to counsel's contention that the Third Circuit's affirmance is the (indiscernible) change that helps him and justifies reopening class certification or discovery.

Setting aside the finality and substantial consummation issues that are there, there are four reasons why the Third Circuit's affirmance does not help him. Number one is the Third Circuit specifically ruled that Anderson Memorial does not have standing to represent individual putative class PD claimants.

Number two, they specifically discussed and rejected his argument which he raised as a plan appeal as a feasibility issue that the overruling of Frenville by Grossmann's was going to lead to a large number of substantial new property damage claims.

Number three, and this picks up Your Honor's question about how the class 7A case management order works. The Third Circuit affirmed a program laid out in the class 7A case management order. That is completely antithetical to class treatment. It provides the stepwise process where

if the claimant comes in, whether it's a so-called gap claimant who hasn't submit -- didn't submit by the bar date can come in and file with the PD trust, can argue excusable neglect, can argue its claim, should not be discharged for due process reasons, can argue all of that. There are 17 specific points the state law, when the building -- when asbestos was in the building, when asbestos was discovered. All those 17 points are laid out in the plan. And they go stepwise first to the PD trust. Grace gets a chance to comment. And then it gets litigated before Your Honor.

And if Your Honor rules that the claim is not discharged, it gets litigated in the District Court of Delaware or any other District Court. Very fair procedure compliant with due process, affirmed by the Third Circuit, and something that the class mechanism doesn't allow individualized treatment to do.

Fourth, with regard to his point that the Third Circuit found, he claims, that there are and will be substantial property damage claims, that is completely incorrect. He also -- he made the same argument with regard to our expert witness at the confirmation hearing, Dr. Denise Martin. He said in his papers that she estimated in her testimony that there would be substantial future property damage claims and that the claims would number as high as 464,000. She made no such estimate. The Third

Circuit made no such finding. What we're talking about here is a very specific section of 524(g) with two prongs. It's 524(g)(2)(B)(ii) and then the two prongs are prong (I) and prong (II).

The first prong -- both are required to affirm a 524(g) plan. The first prong, 524(g)(2)(B)(ii)(I), says that the Court has to find that there will be substantial future demands. Prong (II), which Mr. Speights omitted to mention in his brief, says the Court has to find that the amount, the number, and the timing of those future demands are indeterminate. And that's what our expert Dr. Martin opined, that's what the Third Circuit found. She said, will there be future property damage demand? She said most likely, in her opinion. Will there be any merit to them at all? She couldn't say. What will be the quantity? She can't say. I am providing no estimate. That was her testimony.

And the 464,000 figure that he cited is very misleading. That was in a factual background section of her report where it had nothing to do with Grace. She recited a McGraw-Hill article that had estimated the number of steel frame buildings built in the US from 1959 to '73. She recited a listing of structures with Acoustical Framing or Acoustical Plaster, rather, in the US from 1940 to '73, just as background facts about US construction, no tie to W.R.

Grace, no tie to asbestos containing materials from Grace, no estimate period. So that was strictly a compliance with 524(g). It made no factual finding about how many PD claims there would be at all.

And where's the evidence he submitted of any claims since we've gone effective? We went effective on February 3rd, 2014. The PD trust is -- I mean, there's a telephone sitting there on a desk that has not rung eight hours a day, five days a week for 15 months. The poor guy sitting there like the Maytag repair man at the PD trust hasn't gotten any claims.

THE COURT: Reminds me of the prop our estates professor used in law school. He had a telephone. He used to call it the magic telephone because you really couldn't call up and find out what the decedent really wanted unless it was in the will, but I understand the point.

MR. DONLEY: The phone -- there's an old Jimmy Buffet song, if the phone doesn't ring, it's me. And that phone has not rung for 15 months. So let me turn to the issue of discovery because that's their specific request as clarified by the reply. We obviously think it's improper but --

THE COURT: Well, let me -- just so that we're clear for the record. While we spent most of the -- or I have anyway -- most of the argument talking about, frankly,

the underlying merits of requests for class certification, what's before me today is limited to a request for discovery.

MR. DONLEY: Yes, sir.

THE COURT: Okay.

MR. DONLEY: And I'd like to address that -- that's the gist of my comments and then I'll have one other topic about their standard of review they have to meet at the end. But let me address most of my comments to the discovery request.

The key point is that for approximately 20 years, Your Honor, going back about almost nine years, more than nine years before the petition date even, Anderson Memorial had extensive nationwide discovery on numerosity, on the Grace sales invoices, records, billing registers, and all the asbestos containing materials Grace sold. And you don't have to just take my word for it. I'm going to quote from Mr. Speights reply brief where he said at page 2, Anderson Memorial had "extensive nationwide discovery that it has garnered against Grace over many years." His words. It is conceded. He then sidestepped and said, we're not going to talk about that now. We don't want to talk about it now. We may talk about it later and come back.

We also got some specifics on that discovery from him in Exhibit D to the reply which was an affidavit of

Murdoch (ph) which clarified that in 1995 -- this goes back now six years before even a petition date. They had massive discovery going on. They went up to the Grace document depository in Boston, got all the records, got access, copied them. I thought it was 15 bankers' boxes, their affidavit said 7, but it doesn't matter. They got all the sales records and billing registers and have them at least now electronically loaded and manipulated. So this was in 1992.

They filed the putative nationwide class in South Carolina. That's the case that he's still pursuing, Anderson Memorial vs. Grace. It was tailored in '96 by a ruling in South Carolina to limit it to statewide class members. And Mr. Speight's firm spent 12,000 hours on that litigation pre-petition. Again, that's in his motion at page 12. 12,000 hours. Very substantial effort. And, you know, I don't believe for a second that was just sitting around at the library researching cases on Westlaw. They were taking discovery, interviewing witnesses, finding facts, finding buildings for 12,000 hours, culminating in a two day evidentiary hearing. They used all that discovery in a two day evidentiary hearing in 2000, again, the year before Grace's petition. That's from their motion at page 12 again.

They went up to the depository -- they not only

copied all the documents from Grace's depository, they got to take the depositions of -- there were two outside lawyers for Grace who ran that depository up in Boston: Mr. Murphy and Mr. Murphy, no relation. I think one was Rob Murphy, one was Matt -- I mean, the name doesn't matter, but they took the Murphy's depositions, all the ins and outs of how the depository runs, how the records are kept. Had full access to all of that.

Then when the Chapter 11 case gets filed here in 2000, they made full use of those years of extensive discovery in the Chapter 11 case in four respects. Number one, they used those extensive Grace sales records to prepare and file more than 3,000 individual proofs of claim. And just as an aside, if they have the connection with these 3,000 people, why haven't they contacted even one and been able in the 15 months since emergence to file a -- to start the 7A process going. There hasn't been one. But they prepared and filed more than 3,000 individual proofs of claim. A lot of them were expunged or withdrawn as you've seen in our papers. I won't repeat all that chronology with Judge Fitzgerald. And by the time of the class certification hearing, excuse me, in July 2007 there were only 159 left. And Judge Fitzgerald -- Anderson and 158 others, and Judge Fitzgerald cited that with support of her numerosity finding.

Second thing they did in specific support of their class certification motion which was dated October 21st, 2005, Anderson Memorial identified thousands of individual property damage claimants in that motion and I quote from that motion. This is at page 4 of their motion cited in our response at pages 8 and 9, they stated we have obtained from "Grace's own records which identified thousands of known buildings by street address." So they had that discovery, had those records.

Number three, time came for the class certification hearing on July 5th, 2007. And this is where the famous 15 bankers' boxes were offered and they argued Judge Fitzgerald abused her discretion by not admitting them into evidence. We disagree. We believe you can't just dump in 15 boxes without calling the parts that are relevant and identifying that. But in any event, that's an appeal issue on -- or the propriety for evidentiary ruling. It's not a justification for reopening class discovery.

At the hearing, Mr. Speight's noted that he -- in his brief, he corrected us when we said it was 15 boxes of hard copies. He said, no, I had them on CD-ROM. I wasn't trying to dump in 15 boxes of paper on Judge Fitzgerald. Well, it doesn't make a difference. 15 boxes worth on a CD-ROM, you can't dump into evidence anyway. But the point is they had the documents. They had the discovery. It was

electronically loaded on a CD-ROM. We now know from this affidavit Exhibit D to that reply, the affidavit of Murdoch, that they have been able to search, sort, slice, and dice it. That's where they called out these Masonry Fill records with -- I'll come back to that in a minute.

They have some amazingly -- they took 33 specific months and they counted 8,065,000 and like 137 different records that purported to show something. I'm not sure it was in support of a point that really helped them, but they have -- certainly had it electronically loaded, had the ability to search it. Apparently from that affidavit they didn't actually do the sort until 2013, but it was loaded and they had the ability. The point is, they had all of this back before 2007, had the ability to search, sort, analyze, and do whatever they want with the discovery.

The fourth point on what they did during the Chapter 11 with the discovery is -- and this is where I had my note, I'm sorry, on the Masonry Fill specifically. This is at page 12 of their reply. Here's where they took the Grace billing records, the ones they got back when they went to Boston in 1995 and got, and in their reply brief they sliced those. And here's the exact number. They say Masonry Fill in a particular 33 month period, I'm not sure why they selected that 33 months, but whatever they think is a relevant period to support some point, they can -- they've

shown they can do that. There were exactly 8,065,310 bags of Masonry Fill sold. I think, just as an aside, Your Honor, the point they were trying to make is they're trying to say there's equivalence between ZAI, which is in a separate class the Zonolite Attic Fill and Masonry Fill because both as a source material were made from a particular mineral called vermiculite.

First of all, that's a totally irrelevant argument here if Zonolite Attic Insulation wasn't properly classified in a separate class, that's a Section 1122 classification issue that they should have raised in plan objection. It has nothing to do with the proceeding here.

THE COURT: Well, as I read the Third Circuit opinion, it kind of was raised.

MR. DONLEY: Well, it was --

THE COURT: And rejected.

MR. DONLEY: Raised and rejected. So it's not -- it's too late to raise it, but even if they were raising it new, I mean it's not relevant to class certification or discovery. I think that's why somehow they were get -- I mean, the Masonry Fill and ZAI are different products. Masonry Fill is used -- they pour it into the porous openings in cinderblock to make them -- to take the air out and insulate it. And that's used primarily in commercial buildings. It's used in schools and other things. It may

be used in a few homes.

The ZAI is used in attics of homes and it's poured into the attics to make insulation. The vermiculite is used in both. It's a different size of vermiculite. The key difference on these two, though, Your Honor, with regard to the ZAI, prior to the petition date, that was a very actively litigated product. There were claims brought against Grace. There was a class certified in Washington State called that Barbanti class relating to ZAI claims. And there were a lot of ZAI claims filed by the bar date. There was a separate classification, class 7B. There was a class settlement. There was a class settlement hearing. And he's saying, "It's all unfair. It's all unfair." Well, those are class settlement hearing and plan classification arguments.

In contrast, how about Masonry Fill? How many out of the hundreds and hundreds of pre-petition property damage claims litigated against Grace, how many of them were Masonry Fill? Zero. There was never one. How many Masonry Fill claimants filed a proof of claim by the bar date in 2003? Again, zero. How many Masonry Fill claimants have come forward since then, either during the case or since emergence? Zero. So how in the world Masonry Fill claims helps him on numerosity is -- totally eludes me. That supports the absence of numerosity.

Let me turn -- following up on discovery, let me turn to the discovery that was specifically conducted for purposes of class certification, after he filed his class certification motion in 2005 leading up to the hearing in July of 2007. In his reply, Mr. Speights protests that they only had one year to discuss class discovery. That's on pages 24 and 25. Well, frankly, Your Honor, one year of discovery in a bankruptcy case, in my experience, is really not something to be aggrieved about. Beyond that, he says that Judge Fitzgerald on August 21st, 2006, this is at page 24 of the reply, he says on August 21st, 2006, Judge Fitzgerald shut down numerosity discovery. She shut it down on August 21st, 2006. We will demonstrate that that is false.

The history of discovery on class certification started in December of 2005, two months after Anderson filed its motion and Anderson initiated a series of discovery requests in December of 2005. And they made the choice not to focus on numerosity, superiority, or any of the other issues germane to class certification. They had a couple of document and 30(b)(6) requests on that, but primarily to focus on discovery on a whole host of utterly irrelevant tangential wild goose chases, to put it charitably, wild goose chases.

One was often (indiscernible) about communications

between Grace and the Sulitex (ph) trust on some theory that there was some conspiracy against the Speights firm there.

Second topic, purported efforts in 2001 to keep Mr. Speights off the official property damage committee, nothing to do with class certification. All these irrelevant discovery requests. Discovery into Grace's settlement of prepetition claims, whether Grace properly settled and at the right amount a whole host of prepetition claims and why they didn't settle the Anderson claim prepetition. Insurance, they sought to depose Frank Perch at one point. This was not initially, but in early 2007. I mean, all of this had nothing to do with class certification or numerosity.

Judge Fitzgerald, God bless her, was more than patient and tolerant with the Anderson Memorial discovery request that ran amuck, to a point. After a year of this had gone on she finally said in October 2006, and we quote in our papers, she said, "Mr. Speights, stop the fishing expeditions." That's a quote. "Fishing expedition" was her words at the October 2006 omnibus hearing. And that term in particular is important, Your Honor, because we cite the Gutierrez case, which is a District of New Jersey opinion from 2008 in our response at pages 36 and 37. And in that case, just like here, "After years of discovery on class certification, denial of the motion asserted by the class of

the plaintiffs, sought to reopen class discovery while they showed nothing new." Just like here. And the Court said, no, you're just seeking another fishing expedition that's not proper.

The Court acknowledged, yes, Rule 23 leaves the door open to reopen class certification under some circumstances because it's an interlocutory order. But, and I quote from the Gutierrez opinion, plaintiffs "confuse a right to file a renewed motion for class certification with a right to class discovery. Rule" -- continuing the quote from Gutierrez -- "Rule 23 does not convey a right to class discovery." And we cite other cases at page 37 of our response.

I'll just mention them without going into detail, Your Honor, the Doniger case from the Ninth Circuit, the Gentry case from the Fourth Circuit which said especially in the bankruptcy context, "Extensive discovery related to class certification is not necessary." And if you're going to reopen class certification, you have to have some basis. You can't just come in and shoot first, ask questions later. Say I really need discovery. I don't know what's going to show. I don't have any basis now, but I hope it shows something, therefore give me discovery. That gets the thing just completely backwards.

So the whopper, though, the real whopper, Your

Honor, is this February 27th, 2000 deposition of Grace's records custodian Mollie Sprinkle. In Anderson Memorial's reply, they state -- they assert that Judge Fitzgerald limited that deposition, that she prohibited numerosity questions, which she had taken off the table. Remember, those go back two months -- several months earlier, August 21st, 2006, and quote -- this is from page 29 of their reply, "Anderson Memorial did not have the temerity to run afoul of the Court's directive" not to get into numerosity in the Sprinkle deposition.

As they were so constricted by Judge Fitzgerald's supposed order not to get into numerosity at the Sprinkle deposition, their reply at page 29 said that deposition "had nothing to do with numerosity or Grace's sales records." Your Honor, nothing could be more false than that statement. Here is the order, if I may approach.

THE COURT: You may.

MR. DONLEY: Here is the order that Judge Fitzgerald entered granting Anderson Memorial Hospital's motion to compel the 30(b)(6) records deposition that was the Mollie Sprinkle deposition. It is dated February 7th, 2007 if you see the docket entry at the top, Your Honor. I know it says where it's written down below by Judge Fitzgerald's signature February 7th, 2006, but that's what happens like when I write my checks the first month or

two of the year. They year doesn't get updated. Their motion was filed in late '06. This was entered on February 7th, 2007.

Judge Fitzgerald ordered in the last paragraph above her signature that "the above captioned debtor shall produce their records custodian pursuant to Anderson's notice of deposition dated October 30th, 2006, attached as Exhibit A to the motion at the offices of Anderson's Delaware counsel on or prior to February 20th, 2007," dated 2/7, it says 2006 but it's really '07, we can tell from the context.

And then Judge Fitzgerald handwrote in down below, she added in her own handwriting, "And finding that the discovery is subject to all objections and privileges and" -- here's the important part -- "finding that the discovery as sought may be calculated to lead to relevant and admissible evidence as to commonality, typicality, numerosity, and superiority. And thus, at this stage is appropriate." She not only didn't prohibit, she directed and authorized that deposition to go forward on numerosity. And he can't say he forgot about this order. He cited it at page 27 of his reply. He just chose to misrepresent what he said in his reply brief.

The deposition went forward on February 23rd, 2007. Mr. Speights asked the witness,

Ms. Sprinkle, about indices and lists of Grace documents at page 32. The witness answered truthfully. She answered that Mr. Fink, who's sitting right here, that the company had at a certain Grace facility a computer where you can access and index the Grace sales records and so forth. She hadn't seen it personally, but she knew he had it and there was some method to access it, page 33 of her deposition. And then Mr. Speights abandoned the line of questioning, didn't follow up with any more questions, didn't try to take the deposition or ask information of Mr. Fink.

He finally got around to deposing Mr. Fink two years later in the confirmation hearing, then followed up with the abandoned line of questioning, asked him about the computerized index. Mr. Fink answered truthfully and described in detail how the index works. It's several pages Mr. Fink went out giving detailed explanation, pages 30 and 31 of his 2009 deposition, pages 138 through 141. He said it has limited search capability but he described in detail how it works. So there's no denial of discovery. This wasn't some a-ha moment. It was something he was directed to take to focus on back in 2006 by Judge Fitzgerald.

Indeed, I forgot to quote one thing that's critical, Your Honor. Back before she granted their motion to compel the Sprinkle deposition, at the November 20th, 2006 omnibus hearing, Judge Fitzgerald was

getting exasperated at this point. She said, "Mr. Speights, you've got to focus on class certification issues in this discovery, specifically numerosity, commonality, typicality, adequacy, superiority, 'not to something else.'" We cite that transcript and quote it in our response papers in our response brief here at page 10. So far from prohibiting him from taking numerosity discovery, in an exasperated way, she directed him to focus on (indiscernible) and specifically ordered on numerosity the Sprinkle deposition to go forward. The fact that he abandoned the line of questioning and didn't follow through on it is not our problem and is not a basis now seven years later to reopen class certification discovery.

Let me turn to my last topic, Your Honor, which is the standard they have to meet and their failure to meet it. It's a steep standard. I know Your Honor is familiar with the Max Seafood Café case in the Third Circuit and the three factors for the motion for reconsideration: material change and controlling law; material new evidence not available before; and the necessity of preventing manifest injustice due to clear error of law or fact. They haven't shown any of those things.

Rule 23 is fairly similar for the motion for reconsideration test. Yes, of course you can reopen under some circumstances an interlocutory ruling, but you can't

just rehash old arguments and facts. We cited the Panetta and Hartman cases in our response at page 21, the (indiscernible) class action cite is there as well. And you can't just hope that discovery is going to turn something up. You have to have facts and a showing to justify reopening and we cited the Third Circuit cases at page 21 of our response, Hydrogen Peroxide and Hohider vs. UPS for that point.

And the fact that they're asking for discovery first, Your Honor, I think that actually concedes and makes our whole point. It shows that they don't have any facts to justify reopening discovery. If they want discovery to go get the facts, they need to meet the standard. They don't have them now. Well that gets the whole process precisely backwards.

So what are the new facts they've shown? Where are the major new facts they've pointed to? There's a lot of rhetoric about thousands of new claims, a multitude of claims, there's going to be a lot of gap claim, etcetera. Well, we've already dealt with that. There's no evidence of that. The Third Circuit didn't find that. Where's the evidence of even a single claimant, much less a multitude?

We then turn to what they cite in their brief and I was going to go through these, and I even did up a little PowerPoint. I'm going to save time because I know the day's

been going long, Your Honor. I'll just refer you to our brief on most of these. In their motion at pages 16 to 19, they identify three issues they said Anderson Memorial never had any opportunity address. We blow that out of the water in our response at pages 22 to 27 to show how thoroughly each of these was addressed.

Number one is whether -- the issue of whether a putative class member's claim is barred if they fail to file an individual proof of claim. They make an amazing statement in their reply. They say that we now don't dispute that point at all. Of course we dispute it. We've disputed it adamantly from day one. We dispute it today in all our papers, but the point is, it was fully addressed before and if it wasn't, and we've documented that at pages 22 to 25 of our response -- if it wasn't, that's a due process issue they should take up on appeal. It's not a basis for reopening discovery.

Number two, they say they had no opportunity to address the issue of whether Grace gave adequate notice to known building holders. Again, fully argument below, this is the issue where Grace moved -- asked Judge Fitzgerald, we want to send actual notice to the known represented building owners by mailing first class addressed to the last known address. And the PD committee, if Mr. Speights -- of which Mr. Speights was the co-chair came in and said absolutely

not. You're not going to get in our knickers and get into communications with our clients. The plaintiffs' lawyers will take care of all that, and over our protest, that notice procedure was approved. Judge Buckwalter affirmed -- the Third Circuit affirmed that notice procedure.

A third issue they said they were never heard on was the timeliness of the class certification. Again, pages 26 to 27, we document -- blow out of the water all the places where that was fully litigated below. They're simply wrong on that.

In their brief then, Your Honor, they turn to what -- they identify what they called nine new developments that justify reopening discovery. They added three more -- always suspicious when someone has a grab bag of like nine -- they've got to come up with nine things, and then they add three more between the time of their motion and their reply. And then added one more today in the argument, this MK-4, MK-5, and MK-6. First I've heard of it, so I guess there's 13 now. But I'm not going to go through each one. I'm just going to identify -- we address all of these in our response at pages 27 to 35. None of them are new.

If you look at the first six or seven, they're all events that happen in 2008 and 2009, six, seven years ago, the ZAI bar date order, the appointment of the property damage future claimants rep., Grace's brief where we

supposedly admitted that the class proof of claim mechanism is sufficient. When he gave the citations, our briefs said just the opposite. I mean, these statements are just false and we've documented that they're false.

So they're old -- they're all issues that are either bar date notice objections, or should have been if they even were asserted, or maybe it's a ZA class settlement hearing fairness notice -- issue, or maybe it's a plan objection. None of them are germane to the issue here of reopening class certification. And just referring Your Honor to our brief on all those points rather than repeating them, I'll pick up the two that he mentioned at the very end there only and then I'll sit down.

One is he said the Masonry Fill. Judge Fitzgerald didn't consider that. That's the new tectonic shift in the plates of the earth that justifies reopening discovery. Well, again, this is the point. There was never any Masonry claim prepetition. The bar date notice program, the definition is attached as one of the exhibits to our brief. The notice of the property damage claim was very broad, extremely broad. It had publication, notice, vetted exam in 18 different ways, approved by the Bankruptcy District Courts and the Third Circuit. That's law of the case now.

Finally he said the State of California. That's the tectonic shift in the plates. That's the key that

justifies new development. Well, that was back in 2008. In 2009, if it was such a tectonic shift in new development justifying reopening discovery, you know, I've got a question, why didn't he raise that with Judge Fitzgerald? They've denied that they're trying to get a second bite of the apple here and I understand they've made that statement. But if that's the case, what is -- they've given no explanation as to why they're raising things from 2008, 2009, and now -- other than that, I've heard no cogent reason why. This is old news in the State of California.

What happened in the State of California is there were a series of property damage claims that we objected to, moved for summary judgment on statute of limitations grounds. Judge Fitzgerald granted -- it was summary judgment, right, Lisa? Right, Judge Fitzgerald granted summary judgment on the ground that the State of California had a bunch of other property damage claims regarding other buildings, and so they should have known very early on that the statute was running. Judge Buckwalter reversed on the ground that no, those claims are alive because the statute of limitations, as he interpreted California law, didn't start running until there was actual contamination in those buildings.

Well, the key is Judge Fitzgerald, not for purposes of her summary judgment ruling on those particular

claims and the contested matters on those -- or the objections on those claims, but for purposes of her class certification ruling expressly said, "Mr. Speights, I'm going to give you the benefit of the doubt. I'm going to assume that the statute of limitations doesn't start running until actual contamination occurs in the building." So for the purpose of class certification, she assumed his position on statute of limitations which Judge Buckwalter ultimately adopted when he reversed and that was factored into her numerosity opinion. So the State of California doesn't help at all.

To finish, Your Honor, numerosity, where were we in 2008 when Judge Fitzgerald decided, she said there was just the Anderson claim and 158 others. That's not enough. If they disagree with her methodology, they've got their appeal to pursue. The numbers, even lower today as we said in our papers. Now it's just Anderson one settlement claim. That's the settlement status of which it's kind of disputed and then 37, I believe, Canadian claims that were dismissed and are on appeal. So depending on how you count those, it's either 2 or 39 claims counting for numerosity.

No new claims since emergence have come into the PD trust at all. The burden is on them to show this overwhelming new facts, tectonic shift in the facts that justifies reopening under Max's Seafood Café or Rule 23.

And they haven't gone -- and you don't simply get discovery on a wing and a prayer on something you hope for. And discovery, Your Honor, is not costless. These things -- this company has been through a massive burden of cost and to go back and impose further discovery on them just because of something he hopes for just isn't right. And when you look at their request, their requests themselves are completely inappropriate.

They ask for discovery and to each and every one of the 200,000 asbestos personal injury notices that went out. They want to go into those communications and who they went to. It's just -- at some point, you know, there's fair discovery and at some point there's harassment in trying to impose burden and cost. And this discovery I submit -- we submit, Your Honor, is simply not justified.

THE COURT: Thank you.

MR. DONLEY: Thank you, sir.

THE COURT: Mr. Speights, I'll give you last word, but briefly.

MR. SPEIGHTS: Unfortunately, in my area of the country we talk a little slowly, so I'll try to speed it up, Your Honor.

THE COURT: It helps me to understand, though, that way. So that's good.

MR. DONLEY: And I apologize for talking -- I

always talk too fast. I'm sorry.

THE COURT: I've had faster.

MR. SPEIGHTS: Quickly, number one, I plead guilty to conducting extensive discovery against Grace. That is a reason, one of many reasons why we shouldn't require individual claimants to go through all that discovery over years of individual litigation.

On the discovery issue, succinctly, I asked for the exact discovery I'm asking here today within two weeks of Grace filing its response. There was a stay for months between February and August when nothing happened in the bankruptcy except mediation. In August, right after that stay was lifted, Judge Fitzgerald ruled and I believe clearly granted and I believe Grace acknowledged it later his motion for a protective order. There is no question that I took Mollie Sprinkles deposition.

First of all -- let me back up -- at that time, Grace had attacked the adequacy of my law firm to represent Anderson and the bulk of the discovery dealt with that. And finally with the encouragement of Judge Fitzgerald, they withdrew that adequacy, which is one of the Rule 23 prerequisites, they withdrew that and so most of the discovery evaporated.

Now I'm taking too much time on this but I sort of feel like I'm defending my honor a little bit here with

Ms. Sprinkle. No question Judge Fitzgerald ruled with me one time on one piece of discovery and granted my motion to compel, compel the notice of deposition I had served. This is the notice of deposition. "Counsel for Anderson Memorial Hospital will take the deposition of the records custodian for documents which refer or relate to Anderson Memorial Hospital's lawsuit prior to the date the debtors filed their petition for reorganization." That's what I was allowed to do. I never interpreted and I believe it would have been reckless to interpret that -- Judge Fitzgerald's order as somehow setting aside what she told me in August 2006.

In fact, Your Honor, Grace told the Third Circuit Court of Appeals, quoted in our briefs, that they had no way of identifying claimants other than going through millions of records of documents. In fact, later on I did take Mr. Fink's deposition and another lawyer in the office who identified this database which I specifically asked for in December of 2005. And that's what I want to pursue today.

I think one of the strongest arguments in favor of the discovery is the initial argument that Mr. Donley made about the Third Circuit when he said, "Well, with respect to Denise Martin, our expert, the Third Circuit did this. The Third Circuit did that." The Third Circuit actually says, "There remains a significant chance that future property damage claims will be asserted against Grace by property

damage claimants," at page 342 of the opinion. But Mr. Donley wants to walk back a little bit what Grace represented to get his 524(g) by saying, "Well, Ms. Martin didn't do this or Ms. Martin didn't do that, or she just said this." In fact, the deposition of Ms. Martin said she was supplied no documents by Grace. She did it on a national sort of basis of various documents available through the government, I think.

But in fact, Your Honor, the numerosity discovery we want, the database, to the extent they're walking back Dr. Martin's testimony will, in effect, buttress Dr. Martin's testimony, we believe, showing there's clear numerosity.

Now we're not saying -- I heard Your Honor say I think the Third Circuit ruled that. We are not trying to say that Anderson is being treated unfairly here. We certainly made some suggestions in the Third Circuit about that.

THE COURT: They seemed like more than suggestions to me.

MR. SPEIGHTS: Well, I'm not sure what Mr. Rosendorf argued but I'm sure it was brilliant. But in any event, that's not where we are today, okay? We accept the Third Circuit's decision on that. What we're saying is there's a precedent here that was established in ZAI that

ought to apply to Anderson that a class action is not limited to those who filed individual claims. It's an acknowledgment later by Grace who asked for that, that Anderson should have the benefit of the same precedent that a class is not limited to individual claims.

One other little point about ZAI, Mr. Donley said ZAI was actively litigated before the bankruptcy and not Masonry Fill. We filed the first case, Anderson did, when we admitted the complaint for ZAI and Masonry Fill. Those other cases, there were several class actions filed and shortly before the bankruptcy, one of which was certified a few months before the bankruptcy (indiscernible). And it wasn't this -- there weren't thousands or hundreds of cases about ZAI. There were a few class action cases and we had already filed a Masonry Fill case.

Your Honor, I'm trying to honor your directive to be brief. There seems to be a basic disconnect here. We're now dealing strictly with class litigation. And this goes to the question of when nobody is called, I'm the Maytag repair man up here. Well, typically class actions, just like ZAI when they started filing several class actions, the same law firms filed several class actions before the bankruptcy -- filed those before there are any plethora of individual cases.

We just concluded a class action against GAF

Shingles and Homes. We filed the first case in 2005. One homeowner in South Carolina, no other cases. We got the case certified. The minute we got it certified, there were tagalong actions brought by other people. Then there was an MDL, no individual cases. And recently we settled hundreds of thousands of shingle cases around America which originally resulted from one individual case.

It's not the test of how many people have called or how many individual cases have filed when you file a class action. The purpose of the class action is to avoid the multiplicity of litigation and to have that. But having said that, Your Honor, I'm sorry Mr. Donley hadn't been called, I don't know if any of those people's claims have accrued to begin with, whether they're ripe and they can call and file claims. I don't know if anybody knows that they have Masonry Fill behind their walls because Grace certainly hasn't doesn't anything to notice them about any potential dangers, even though there's a continuing duty to warn in most states. I don't know what people know. And I don't know if their claims have accrued.

But I do know -- I guess, Mr. Donley, if you want me to have 3,000 claimants call you next week, those are the claimants attached to the individual class proof of claim form. We don't want to do that. We want them to be part of a class. They want to be part of a class. That's the way

we want to proceed.

So the idea that, well, people haven't been calling is antagonistic to the exact purpose of a class action. Your Honor, I close like I begin, we want our numerosity discovery. We want to set the record straight that what Grace told the Third Circuit was in error. It's a simple question of getting the database and deposing somebody about it.

And then we want to brief these issues for the Court and we want to convince the Court that we can be the Court's best friend, this Court and other Courts, because we provide the only means of wrapping up the PD litigation in one Court in one proceeding at one time, and not over a period of many years. Thank you, Your Honor.

THE COURT: Well, thank you, Mr. Speights. It's always good to have friends. I will issue a ruling in due course and we'll proceed from there.

Is there anything further we need to talk about today?

MR. O'NEILL: No, Your Honor.

THE COURT: Thank you all very much. That concludes this hearing. Court will stand briefly in recess to allow the next group to set up.

Thank you.

(Chorus of thank you)

(Whereupon these proceedings were concluded at 12:01 PM)

C E R T I F I C A T I O N

I, Jamie Gallagher, certify that the foregoing transcript is a true and accurate record of the proceedings.

Jamie Gallagher

Digitally signed by Jamie Gallagher
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Date: April 17, 2015

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